

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-6087

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-6087

JESSE B. STEPHENS, on behalf of
himself and all other persons
similarly situated,

Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA; UNITED
STATES POSTAL SERVICE; E. THEODORE
KLASSEN, in his capacity as Post-
master General of the United States;
UNITED STATES CIVIL SERVICE COM-
MISSION; ROBERT E. HAMPTON, in his
capacity as Chairman of the United
States Civil Service Commission;
and ELMER B. STAATS, in his capacity
as Comptroller General of the United
States,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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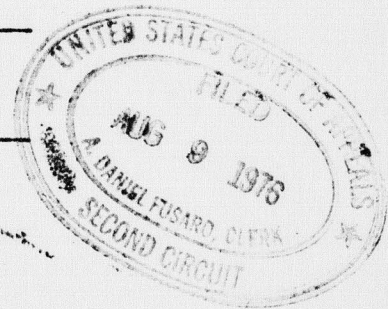


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POINT I

WHETHER THE FINDING BY THE DISTRICT
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OF THE THEFT OF 11 ARTICLES OF MAIL
FROM THE POSTAL SERVICE WAS, ON THE
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UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

-----X
JESSE B. STEPHENS, on behalf of himself and :
all other persons similarly situated, :

Plaintiff-Appellant, :

-against- :

UNITED STATES OF AMERICA; UNITED STATES :
POSTAL SERVICE; E. THEODORE KALSSSEN, in :
his capacity as Postmaster General of :
the United States; UNITED STATES CIVIL :
SERVICE COMMISSION; ROBERT E. HAMPTON, :
in his capacity as Chairman of the United :
States Civil Service Commission; and :
ELMER B. STAATS, in his capacity as :
Comptroller General of the United States, :

Defendants-Appellees. :
-----X

PRELIMINARY STATEMENT

Jesse B. Stephens, the plaintiff-appellant, appeals from a judgment entered on March 16, 1976 by the District Court for the Southern District of New York (Thomas P. Griesa, J.). The decision is unreported.

ISSUE PRESENTED FOR REVIEW

1. Whether the finding by the district court that

the appellant was guilty of stealing 11 articles of mail from the Postal Service was, on the entire evidence, clearly erroneous.

STATEMENT OF THE CASE

The Nature of the Case:

Jesse B. Stephens, a former employee of the United States Postal Service, sued for payment of certain pecuniary benefits he had earned during the course of his employment. The Postal Service refused to pay him his benefits on the ground it was charging him with the theft of certain insured (registered) mail and he was indebted to it for the losses it incurred when it paid claims based on their nondelivery. The Postal Service counterclaimed for the amount of its losses.

Course of Proceedings:

Since Stephens had never been afforded a hearing by the Postal Service on the validity of its claim that he was indebted to it, his request for a trial de novo before the district court was granted.

The case was tried without a jury, and at the close

the court rendered its decision from the bench. It held that on Stephens' claim, the Postal Service owed him a total of \$7,533 (representing a lump-sum retirement credit of \$6,838.83, unpaid salary of \$240 and unused annual leave of \$454.17) and that on the Postal Service's counterclaim, he owed it a total of \$7,620 (representing the amount paid by it on claims for undelivered mail).

The net amount owing between the parties was \$87 to the Postal Service and a judgment was entered reflecting it. It is from that judgment Stephens appeals. Leave to proceed on appeal in forma pauperis was granted by the district court.

STATEMENT OF FACTS

Stephens worked for 23 years — January 1948 through August 1971 — for the Postal Service, which succeeded the Post Office Department in April 1971. (A2)¹

¹

"A" refers to the joint appendix. "Tr." refers to the trial transcript.

When Postal Service is used in this brief, it includes any action taken by its predecessor Post Office Department.

On March 22, 1969, Stephens was arrested while on duty and charged with embezzling a single test package that had been prepared and put into the mails by the Postal Service.² He was suspended and subsequently convicted of the charge and his employment was officially terminated in August 1971. (A2-3)

In November 1969, about 8 months after his arrest, Stephens was notified for the first time by the Postal Service that it had incurred losses in the sum of \$8,425.46 by reason of mail thefts it was attributing to him. (A5) To recover its losses, the Postal Service withheld from Stephens certain benefits he had earned during the course of his employment, in the nature of unused annual leave of \$454.17, unpaid salary of \$240, and a lump-sum retirement credit of \$6,838.83 and applied it to the indebtedness.³ (A5-8)

2

The test parcel is not one of the parcels covered by the counterclaim. (Tr.25)

3

Although the lump-sum retirement credit was technically payable by the defendant United States Civil Service Commission, in September 1971 the Commission was advised by the Postal Service of its claim against Stephens and was requested to withhold it, which it did, and in February 1972 the Postal Service applied it to the indebtedness. (A7)

At the trial, the Postal Service offered evidence — through a mixture of Postal Service records and the testimony of a Postal Inspector Stewart Jones — that 11 articles or parcels of registered mail⁴ had been stolen by Stephens while he was working in the registered mail section of the 36 Street (New York City) Postal Facility between January 1966 and March 1969, and the Postal Service paid claims based on their non-delivery.⁵

The Postal Service's chief witness was Inspector Jones, whose job was to investigate registered mail losses at the 36 Street Facility. (Tr.6-7)

He described the registry section as a caged area, about 15 by 20 feet, surrounded on three sides by a wire mesh and on one side by a solid wall in which there was a lookout or observation gallery. (Tr.11-14)

4

The original claim was 12 articles, but reduced to 11 by the Postal Service at trial. (Tr.74)

5

The appellant does not contest that the parcels were not delivered (or not delivered with all their contents) or the amount the Postal Service paid on the various claims.

The registry had been relocated a few months before Stephens' arrest so it could be viewed from the gallery. (Tr.40,158) The registry had a locked door through which employees entered and left, and an opening through which mail was given to carriers for delivery. (Tr.13) On the walls were boxes or "cubbyholes" used to sort and hold mail for pick-up by the carriers, and a safe for money and stamps. It also contained tables to sort and stamp mail. (Tr.152,5) Registry clerks worked side-by-side without any partitions. (Tr.150)

The registry was only open 6 days a week (except Sundays) between the hours of about 6 A.M. to 5 P.M. (Tr.146)

Jones also outlined the general procedure for handling registered mail: It is carried in large locked pouches (unless it is too large, in which case it is carried outside the pouch) and mail valued at over \$400 is separately listed on a form called a manifold, a copy of which travels with the pouch. Before the mail actually reaches the 36 Street Facility, it is usually necessary to open a pouch, sort the mail and

redistribute it to different pouches depending upon its destination. (Tr.152-3) Each time a pouch is opened for such purpose a new manifold is made up. Pouched mail valued at under \$400 is not separately listed on the manifold, but is listed by total number (bulk pieces). If mail is too large for the pouch it is carried outside it, regardless if its value.⁶ (Tr.20-23,29-34,145) Jones admitted that sometimes mail required to be separately listed on a manifold was not. (Tr.23-24)

In connection with his investigation, Jones stationed two employees in the gallery on March 15, 1969, one of whom, George Moffa, testified at the trial that he observed Stephens doing something with two parcels which he thought was suspicious. (Tr.12,133-8) He later conceded he didn't know if what he saw Stephens

6

Outside pieces are listed on the manifold by the letter "O." However, manifolds for only two parcels (3&4) were introduced into evidence, one with the particular parcel listed, but without an "O." It cannot be determined if the remaining parcels traveled outside the pouch.

doing might have been actually proper, because he never worked in a registry section. (Tr.140-1) Moffa never saw Stephens take anything from either parcel, and although he knew they were delivered to their addressees, he did not know if their contents were enclosed. (Tr.138,140-1) Jones, however, confirmed that both parcels were in fact delivered with their full contents. (Tr.179-180)

A week later, on March 22, Jones prepared 2 test parcels, had them placed in the registry section, and stationed himself in the gallery, where he observed Stephens tampering with one of the test parcels and arrested him. (Tr.14-19) These were the only two occasions Jones stationed observers in the gallery. (Tr.39)

As an adjunct to his investigation Jones was to determine if there were any other losses which could be charged to Stephens because he had been arrested; he concluded that there were. (Tr.43)

His conclusion was based upon his determination of when each parcel arrived or should have arrived at the 36 Street Facility and whether Stephens was on duty

at about such time, the fact the contents of the undelivered mail was jewelry and Stephens was arrested for a jewelry theft, and the losses stopped after the arrest. (Tr.43,143)

Jones' investigation was directed exclusively at Stephens— no other employees were ever investigated. (Tr.163)

Jones testified that he started to investigate the 36 Street Facility because the Postal Service was incurring losses it believed the Facility was responsible for and the losses were all in the nature of jewelry. (Tr.41) He also testified there were other jewelry losses from the Facility not the subject of the counterclaim, which he could not attribute to Stephens or any other employee. (Tr.161-2) He did not check to ascertain whether there were any nonjewelry registry losses. (Tr.160-1)

Jones testified he did not know how many keys there were for the registry door or who maintained them or whether access could be gained after it closed for the day. He did not know if nonregistry clerks

used the safe, or if mail was left overnight outside the registry. He could not give the average number of clerks working in the registry at the same time of if undelivered mailed was left in the registry overnight.

(Tr.145-9) He did state that any registry employee had unrestricted access to any mail in the registry. (Tr.156)

Stephens, who had always been a registry clerk, testified there was one key for the door, which after the registry was closed was turned over to night foremen until the registry reopened the next morning. After closing, workers often went into the registry using the key to check on mail or to pick up pay checks. During open hours, nonregistry clerks went in and out of the registry to use the safe. Mail delivered to the Facility when the registry was closed would remain outside of it until it opened, some not in pouches, where every worker in the Facility had access to it at all hours. (Tr.191-4) An average of about 8-13 clerks worked in the registry and additional nonregistry workers called in when needed. (Tr.190)

Jones testified that he made no checks to determine if there was a turnover in registry personnel; Stephens testified that there was constant turnover and specifically mentioned two workers who left at around the time of his arrest. (Tr.159,195)

The total valued assigned by the claimants to the lost property was about \$100,000. (Tr.162) As explained by Jones, many persons undervalue registered mail and pay the minimum Postal Service insurance rates because they carry independent commercial insurance. (Tr.114)

Jones admitted making no check of Stephens' personal life, his assets, his home, his friends. (Tr.162-163)

Stephens testified that he lived in 2 apartments successively since 1951, and his current rent was about \$100. He supported himself from social security and a veteran's pension, had no assets, had been on public assistance after his arrest, and had received a discharge in bankruptcy based on no assets and liabilities for personal loans, one of which was incurred to pay an

attorney to represent him in proceedings arising from his arrest. (Tr.196-200)

Stephens testified that he had handled "millions" of pieces of registered mail throughout his career and had no knowledge whatever of any of the mail he was accused of taking or why they were not delivered. (Tr.190) Prior to his arrest, in his 23 years of employment he had never been suspended or disciplined by the Postal Service. He testified further that he had never mishandled any mail and had not stolen the test parcel. (Tr.201,207-8)

For the court's convenience and clarity, the evidence surrounding each individual parcel is set forth seriatem through their respective assigned exhibit number.

Parcel No. 1

Date mailed January 21, 1966
From: California
To: New York City
Postal Service
paid on claim: \$315⁷

The records indicate that "in all probability" the parcel was received at the 36 Street Facility on January 22, 1966. A letter to the New York City Police states that it was "lost while in the custody of the Postal Service."

(A55-6)

Jones admitted that he had no memory of looking at any time cards for Stephens, which would show if he worked when the parcel was at the Facility. (Tr.82-5)

7

The amount paid excludes any postage refund and the Postal Service waived its claim to it for each parcel because of the small amount involved. (Tr.78-9)

Parcel No. 2

Date mailed: June 2, 1967
From: California
To: New York City
Postal Service
paid on claim: \$200

The records, as clarified by Jones' testimony, indicate that this parcel was given to the mail carrier by Stephens for delivery, and was in good condition at that time, but was returned to the Facility where it was discovered damaged and without its contents by a registry clerk Olivetto. (A61;Tr.87-90)

There was no testimony by Jones that he had ever looked at Stephens' time cards to determine if he was on duty at the time the parcel was discovered without its contents.

Parcel No. 3

Date mailed: November 30, 1967
From: Ohio
To: New York City
Postal Service
on claim: \$759

The records indicate that the parcel was erroneously bulk billed⁸ to New York and "there is no way to place individual responsibility." (A68) An employee at another New York City Post Office opened mail pouches received from the 36 Street Facility and discovered an envelope, which was part of the parcel, with some of its contents missing; the pouch had been prepared at the Facility by Stephens. (A64-6; Tr. 90-3)

Jones testified that it would have been insane for Stephens to prepare a pouch knowing there were parts of a rifled parcel in it, but it was his belief that Stephens accidentally left part of it in. (Tr. 169-173)

Parcel No. 4

Date mailed:	June 23, 1968
From:	New York City
To:	Massachusetts
Postal Service paid on claim:	\$888

⁸ Bulk billed means that the parcel was not receipted for or separately listed each time it passed between postal facilities, but was included in a mail pouch with many other parcels. Registered mail valued at over \$400 is not bulk billed. (Tr. 21, 23)

The records indicate that this parcel was refused by the addressee and returned to the 36 Street Facility and a registry clerk Olivetto, who was opening the pouches, found the parcel bottom slit and without its contents. (A80) It further indicates that the parcel was "rifled...at an undetermined point" and "there is no way to affix individual responsibility." (A79,81; Tr.93-7)

Parcel No. 5

Date mailed: September 25, 1968
From: New Jersey
To: New York City
Postal Service
paid on claim: \$2,000

The records indicate that the parcel was found at the 36 Street Facility by a registry clerk Olivetto in a damaged condition without part of its contents and that Stephens was on duty that day along with 6 other clerks. (A86; Tr.99-100)

Parcel No. 6

Date mailed: November 26, 1968
From: Missouri
To: New York City

Postal Service
paid on claim: \$1,000

The records indicate that although this parcel was charged out to a mail carrier of the 36 Street Facility, it was not taken out, but returned, to be taken out on the next delivery date. There are no records to show what happened to the parcel thereafter. (A92; Tr. 100-102)

Parcel No. 7

Date mailed: December 5, 1968

From: Alabama

To: New York City

Postal Service
paid on claim: \$700

The records indicate that this parcel was mailed to an address covered by the 36 Street Facility. Jones testified that there were no records to show if it was even ever delivered to the Facility, or where it disappeared. (Tr. 103-8)

Parcel No. 8

Date mailed: December 6, 1968

From: Kentucky

To: New York City

Postal Service
paid on claim: \$158

The records indicate that the parcel was mailed to an address covered by the 36 Street Facility, but that no records show if it was ever even delivered to the Facility. (Tr. 109-110)

Parcel No. 9

Date mailed: January 16, 1969

From: California

To: New York City

Postal Service
paid on claim: \$100

The records indicate that this parcel was mailed to an address covered by the 36 Street Facility, and Jones testified that there was no record of it ever even having arrived at the Facility. (Tr.111-13)

Parcel No. 10

Date mailed: February 13, 1969

From: Minnesota

To: New York City

Postal Service
paid on claim: \$500

The records indicate that this parcel was mailed to an address covered by the 36 Street Facility. Jones testified that there were no records of it ever even having arrived at the Facility. (Tr. 114-19)

Parcel No. 11

Date mailed:	March 5, 1969
From:	Pennsylvania
To:	New York City
Postal Service paid on claim:	\$1,000

The records indicate that the parcel arrived at the 36 Street Facility because a wrapper bearing the registered mail number had been found there without its contents.

(A 110; Tr. 121-129)

ARGUMENT

POINT I

THE FINDING BY THE DISTRICT COURT
THAT THE APPELLANT WAS GUILTY OF
THE THEFT OF 11 ARTICLES OF MAIL
FROM THE POSTAL SERVICE WAS, ON
THE ENTIRE EVIDENCE, CLEARLY ERRONEOUS

Jesse B. Stephens' opening of a single test parcel on March 22, 1969 has proven to be the opening of a Pandora's box. He was arrested and subsequently convicted, served time in prison, and valuable employment benefits he had worked for 23 years to secure were taken away from him. If Stephens is indeed guilty of the mail thefts the Postal Service is accusing him of, it is of course entitled to recover the losses it incurred by withholding his benefits from him. If, on the other hand, Stephens is not guilty, he is entitled to receive his benefits.

While there was no specific finding by the district court that it disbelieved Stephens' testimony, even if Stephens' testimony was totally disregarded, the Postal

Service nevertheless failed to prove by a preponderance of the evidence that Stephens was guilty of the theft of each of the 11 parcels.⁹ Consequently, the findings by the district court were clearly erroneous. Federal Rules of Civil Procedure 52(a).

The Supreme Court, in U.S. v. Gypsum Co. 333 U.S. 364, 395 (1942), defined the scope of review:

A finding is "clearly erroneous" when although there is evidence to support, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Immediately after Stephens' arrest, he became the exclusive target of a Postal Service investigation whose single-minded purpose was to make him, and him alone, responsible for the theft of the 11 parcels of mail.

The district court had only the facts presented to it by the Postal Service based on an investigation in which it had exclusive possession and control of the requisite Postal Service records and the necessary investigative tools and personnel.¹⁰ The investigation

⁹ For a discussion on the meaning of preponderance of the evidence see U.S. v. Masiello, 235 F.2d 279, 286 (2d Cir. 1956) (Frank, J. concurring).

¹⁰ There is only a three year retention period for Postal Service records (Tr.62). - 21-

the Postal Service conducted and the conclusions it pronounced as to guilt had great bearing on the outcome of the case.

Although the Postal Service presented facts—and conclusions—they were insufficient to make out a prima facie case of Stephens' guilt. Notwithstanding this insufficiency, the subtle effect produced was to shift to Stephens the burden of proving his innocence and remove from the Postal Service its burden of proving his guilt. Stephens had only his innocence to offer, obviously not being in a position to conduct his own investigation and offer proof that another person was responsible for the thefts or an explanation for their nondelivery.

He had handled hundreds of thousands of pieces of mail during his career and had no knowledge of any of the articles he was accused of stealing. It was 8 months after his arrest before he was summarily notified that he was going to be charged with mail theft, some of which occurred two to three years earlier.

The Postal Service began its investigation by first postulating that Stephens was the guilty person and then proceeded to gather evidence to bolster its position. At first blush, the evidence appears to be supportive, but when viewed in the light of the investigation's shoddiness and inadequacy, and especially its exclusiveness with Stephens, it is not at all supportive, but actually rather suspect.

To meet its burden of proving that Stephens was guilty of the thefts, an investigation with at least the rudimentary elements of open-mindedness and thoroughness was required.

The elements of the Postal Service's case the district court found convincing were fourfold: (a) Stephens' arrest for a theft of jewelry, (b) jewelry losses occurred in the registry section of the 36 Street Facility when Stephens was employed there, (c) no other employees were shown to have been involved, (d) the cessation¹¹ of jewelry losses following the arrest.

II

Although Jones testified he did not remember looking at Stephens' time card in relation to parcel number 1 and the district court remarked, "I am not just going to take any assumption from him. I won't give weight to that," it was included in the judgment.

A. The Arrest.

Stephens' arrest is a blight on his career and personal life. He went to great lengths to prove his innocence—a full trial, an appeal, incurred debts to hire lawyers. At the trial of this case, he again proclaimed his innocence in the face of all that preceeded. He is not here attempting to relitigate his arrest, but place it in proper perspective.

His arrest has been turned into a syllogism: Stephens was arrested for a jewelry theft; there were other jewelry thefts; therefore Stephens is guilty of the other jewelry thefts. It is specious logic.

If Stephens had been arrested for the theft of registered mail containing, for example, money, and there were other thefts of money, would he have been charged with those thefts?

Evidence of a crime is not admissible to prove the character of a person in order to show he acted in conformity with it. 2 Weinstein's Evidence §404 1037. It is, however, admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Federal Rules of Evidence, Rule 404. See Buffalo's Truck Service, Inc.

v. National Ben-Franklin Ins. Co. of Pittsburgh, 243 F.2d 949, 953 (2 Cir. 1957). The only purpose the evidence of the arrest could reasonably be used would be to show opportunity. Even without the arrest, however, opportunity existed simply because Stephens worked in the registry during the relevant period.

It is noteworthy that in Stephens' 23 years of service, the arrest was the only blemish on his record; he had never been suspended or disciplined.

B. The Losses Occured In the Registry Section When Stephens Was Employed There.

The fact that Stephens worked in the registry when and where the Postal Service claims the parcels would have arrived has been overemphasized to the extent of making it symptomatic with guilt. The registry was open 6 days a week (always closed on Sundays) and he worked 5 out of every 6 days, or 83% of the time. When the Postal Service records do not specifically indicate that Stephens was on duty when a parcel arrived, it assigned an arbitrary self-serving arrival date to coincide with his workdays.¹²

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The records relating to parcels 7,8,9,10 and 11 do not indicate the day the parcels arrived at the Facility. Only parcel 11 is known to have in fact arrived. Under Boerner v. U.S., 117 F.2d 387 (2 Cir. 1939), cert. den. 313 U.S. 587 (1941) the presumption—impossible to rebut—exists that the parcels arrived. What is challenged is not the presumption, but rather the arbitrary arrival dates and the conclusion of guilt.

The claim could always be made that any lost parcel arrived on or about the days Stephens was on duty because of the hours of employment. All of the many registry workers (a daily average of between 8 and 13 or more) worked the same number of days per week as Stephens and the claim could be similarly made that any parcel would have arrived on or about the days each was working.

Numerous other Postal Service employees—registry section and nonregistry section workers—had access to the 11 parcels. Workers in the registry handled thousands of pieces daily, working side-by-side with complete accessibility at all times to any mail; during open hours, nonregistry workers went in out of the registry to use the safe and during closed hours, nonregistry workers entered the registry to get mail or pick up checks, all unrestricted and when mail was sitting unprotected and invitingly on distribution tables and in cubbyholes; mail delivered to the Facility when the registry was closed would remain outside until it opened, some not in the protective pouches and accessible to any worker in the Facility.

In Boerner v. U.S., *supra*, 117 F.2d 387 (2 Cir. 1939), cert. den., 313 U.S. 587 (1941) a mail carrier was charged with mail losses on his route because his route's losses

were vastly disproportionate to losses on other routes, he admitted the theft of a test package and to numerous rule violations, and the losses dropped to normal after his arrest. The distinguishing feature of Boerner is that all the lost mail charged to the carrier were addressed only to persons on his delivery route and due to be received by him when he was the lone carrier and had exclusive accessibility. 117 F.2d 338. Contrast this to the accessibility of the parcels in this case by numerous workers. Stephens never had the singular control over the parcels as the carrier in Boerner did.

In addition to Boerner, there are several other cases involving postal workers charged with the theft of mail where analysis shows that access and control were the key elements to finding in favor of or against liability. In Elmore v. U.S., 465 F.2d 1232, 1234 (4 Cir. 1972), the persons charged with the losses had exclusive control of the lost mail. In the area where the losses occurred in Liberty Mutual Insurance Company v. Staten, 201 A.2d 529, 530 (D.C.C.A. 1964), numerous employees, in addition to the person charged with the losses (but found not liable), had access to the lost mail. In Parker v. U.S., 187 Ct. Cl. 553, 557 (1969), a worker was charged with certain

losses of money collected by various postal facilities and transmitted to the facility in which he worked for consolidation and processing. The charged worker was the only employee in the area of the facility where such monies arrived, he was required but failed to record the arrival of the transmittals which were later discovered missing, and he was the only person working at recording the transmittals. Although the district court in U.S. v. American Surety Co. of New York, 161 F. 149 (D. Md. 1908) found a worker not liable because the lost mail had been handled by and had been accessible to numerous workers, the appellate court, 163 F. 228, 231-2 (4 Cir. 1908), found liability because the charged worker had admitted stealing many items of mail and he could not say that the mail he was accused of taking was not among the mail he stole.

C. No Other Employees Were Shown To Have Been Involved.

The Postal Service never investigated if any other worker might be responsible for the losses or even have any information about them. No inquiry was made to determine if any of these workers were suspended or disciplined by the Postal Service. Stephens could not reasonably

be expected to show the involvement of other employees.

Even the most cursory analysis of the investigation would have revealed that in 3 out of the 11 parcels, the same employee, registry clerk Olivetto, discovered the parcels in a damaged condition. See Exhibits 2,4, and 5. The Postal Service, however, never investigated him. Neither did it investigate the clerk at another Facility who found the remnants of the third parcel in a pouch Stephens had prepared, although Jones stated it would have been insane for Stephens to prepare a pouch knowing it contained the remnants of a parcel, but transformed Stephens into a negligent thief. This is not to suggest that either clerk was responsible for any of the losses, but the failure to at least investigate them stands out.

The total value of the stolen articles was about \$100,000, yet the Postal Service conducted no investigation as to Stephens' personal life, his assets, his style of living. Contrast this to the intensive personal investigation conducted on a clerk in connection with the loss of parcel number 4. (A79)

Stephens lived a rather simple unassuming life: two low rent apartments in 25 years, no assets, bankruptcy, personal loans, welfare and social benefits. An open-minded investigator conducting a background check and finding Stephens' life style might have been compelled to lead to a contrary conclusion as to Stephens' guilt, or to at least conclude that further investigation was needed.

D. Losses Stopped.

Although Jones testified that when he left the Facility in September 1971, the losses had stopped, there were several factors to account for this.

(a) The registry section had been moved only a few months before Stephens' arrest so it could be observed from the lookout gallery, an obvious inhibitor.

(b) The deterrant of Stephens' arrest, which became known throughout the Facility. (Tr. 158)

(c) The constant turnover of workers. Stephens specifically mentioned two who left at about the time of his arrest. (They were never investigated by the Postal Service.)

(d) The presence of Jones during his ongoing investigation. There was no testimony by Jones as to

whether the losses ceased permanently after the arrest or if they resumed after he left in 1971.

The mail losses attributed to Stephens were not the only losses suffered by the Postal Service while he was employed. There were other jewelry losses which could not be charged to Stephens or any other employee. Jones did not know if there were any nonjewelry losses. The loss of one parcel originally attributed to Stephens was dropped at the trial. Cf. Liberty Mutual Insurance Co. v. Staten, supra, 530.

Finally, Jones' testimony that he placed jewelry in the test parcel because "the depredator was interested in jewelry parcels, either bearing the name of a jeweler as a sender or as the addressee "(Tr.41) and he charged Stephens with the jewelry losses because he stole the test parcel, is rather curious because neither the names of the senders or addressees in 3 of the 11 parcels (parcels 3, 9 and 10) contain any indication that the name is that of the a jeweler. Jones obviously ascertained that the contents were jewelry only by looking beyond the names and for parcels containing jewelry. How did Stephens know these three parcels contained jewelry?

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and a judgment entered in favor of the plaintiff-appellant directing the Postal Service to pay plaintiff his employment benefits.

Respectfully submitted,
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